IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 61496-7-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	
KENNETH L.M. AMMONS,	)	Unpublished Opinion
	)	
Appellant.	)	FILED: August 3, 2009
	)	

Lau, J.—Kenneth Ammons challenges his sentence for second degree murder. He contends that the court's comments at his sentencing hearing demonstrate bias, violating his right to due process and the appearance of fairness. Because he waived the appearance of fairness claim and the comments do not show bias, we affirm.

FACTS

The State charged Ammons with first degree murder with a deadly weapon. It alleged that on October 9, 2006, he saw an acquaintance of his, Herschell Rogers, and offered him a ride. Rogers appeared intoxicated, and he passed out soon after getting in Ammons's van. Ammons's girl friend, Rachel Garver, was also in the van.

It was Garver's 21st birthday, and she was drinking heavily. At some point, she became upset about how her birthday was going, and she decided to kill Rogers. She and Ammons drove Rogers to a campsite, removed him from the van, and took turns hitting his head with a hammer until he died. Ammons and Garver admitted their actions after the police arrested them a few days later.

On February 21, 2008, Ammons pleaded guilty to second degree murder with a deadly weapon. He had two prior felony convictions and was facing a standard range sentence between 168 and 268 months. As part of the plea agreement, the parties recommended a 204 month sentence.

The court sentenced Ammons and Garver together on February 27, 2008. Garver's attorney presented testimony from Professor Carol Klingbeil, a forensic evaluator. She testified about Garver's history of suffering abuse in Washington's foster care system. Among other things, Professor Klingbeil stated, "[H]er behavior is explainable in my opinion in terms of what has happened to her, particularly the sexual abuse at an early age. Not only was the abuse permanent, as far as I'm concerned, but it killed her very soul . . . ." Report of Proceeding (RP) (Feb. 27, 2008) at 32–33.

Later in the hearing, the sentencing court commented on its evaluation of Ammons, Garver, and their crime:

> I knew when this case started we were dealing with two of the most damaged people, as far as their upbringing and history, that we've seen in the 21 years I have been here.
>
> . . . . And we've talked a great deal about the issues involving Mr. Ammons and Garver, especially Ms. Garver and the hideous upbringing that she had and turmoil and traumas that she went through. And perhaps her case is as bad as anybody's. . . .
>
> . . . .

> There [are] thousands of people across this state and country [who] are abused every day, sexually abused in the most horrible ways. . . . [B]ut this is about a different case. This is about Herschell Rogers.
>
> Thank goodness that those people who are hideously abused across the country don't take a hammer or club and go crush somebody's skull. Thank goodness . . . many of them are able to pick themselves up, get the help they need, go on to create some usefulness in their lives.
>
> Mr. Ammons and Ms. Garver, for whatever reason, didn't. And as M[r]. Ammons and Ms. Garver sit here today perhaps the abuse they suffered did permanently kill their souls. I'm sure it did, but they're still sitting here today soul[l]ess. Herschell is not sitting here today. These two lost their souls. Herschell lost everything, and his family lost everything.
>
> . . . .
>
> I guess we could argue all day on the different levels of culpability, but I don't see a lot of difference. I just see two damaged people who[se] souls perhaps may be dead, who took Herschell Rogers up river, and then beat him to death with a hammer.
>
> This is one of the worst homicides I have seen. . . .
>
> The cruelty of this, the senselessness of this is just beyond description, and it's hard to get a handle on it. . . .
>
> So although you both have . . . been products of the State of Washington system and have been failed and perhaps for that you deserve some mercy, you're going to have to find it from somebody else. I think you got plenty of mercy when the prosecutor reduced this to Second Degree. I think this is the top of the range case. I know it. You know it. Everyone in this room knows it. . . .
>
> . . . . Mr. Ammons 244 months, plus 24 months for a total of 268 Ammons. If I could get more, I would.

RP (Feb. 27, 2008) at 48–51.

Ammons did not object to the comments at the sentencing hearing or in a posttrial motion. He now appeals.

ANALYSIS

Ammons argues that the sentencing court violated his right to due process and the appearance of fairness because it was biased against him. Because he raises these claims for the first time on appeal, we will only consider them to the extent they

constitute a "manifest error affecting a constitutional right." RAP 2.5(a)(3). To satisfy this threshold requirement for review, Ammons must identify a constitutional error and show how this alleged error resulted in actual prejudice to his rights. State v. Kirkman, 159 Wn.2d 918, 926–27, 155 P.3d 125 (2007).

"The appearance of fairness doctrine seeks to insure public confidence by preventing a biased or potentially interested judge from ruling on a case." In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009). But the Supreme Court has held that this doctrine does not implicate constitutional rights. See State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); see also City of Bellevue v. King County Boundary Review Bd., 90 Wn.2d 856, 863, 586 P.2d 470 (1978) ("Our appearance of fairness doctrine, though related to concerns dealing with due process considerations, is not constitutionally based.") Consequently, Ammons waived this claim by failing to raise it with the trial court. State v. Morgensen, 148 Wn. App. 81, 91, 197 P.3d 715 (2008) (applying the doctrine of waiver to defendant's appearance of fairness claim).

Ammons also argues that the court's comments demonstrated bias that violated his constitutional right to due process. Due process guarantees criminal defendants a fair trial by an impartial judge. State v. Madry, 8 Wn. App. 61, 504 P.2d 1156 (1972). "Impartial" means the absence of either actual or apparent bias. State v. Moreno, 147 Wn.2d 500, 507, 58 P.3d 265 (2002). However, "[a]n assertion of an unconstitutional risk of bias must overcome a presumption of honesty and integrity accruing to judges." State v. Chamberlin, 161 Wn.2d 30, 38, 162 P.3d 389 (2007). A defendant must

support a claim of judicial bias with specific evidence to overcome this presumption. In re Pers. Restraint of Davis, 152 Wn.2d 647, 692, 101 P.3d 1 (2004).

Here, Ammons argues that the court's comments about his soul provide this evidence. We disagree. The remarks, in context, were actually sympathetic to Ammons because they acknowledged his troubled childhood as a partial explanation for his actions. This is clear from Professor Klingbeil's earlier testimony suggesting that childhood abuse "killed [Garver's] very soul." RP (Feb. 27, 2008) at 32–33. Professor Klingbeil made this suggestion in an effort to persuade the court to impose a less harsh sentence on Garver. The court adopted this language to acknowledge that Ammons and Garver were victimized as children and were scarred as a result.[1] But the court ultimately determined that the "cruelty" and "senselessness" of their crime warranted sentences at the high end of the standard range despite this explanation for their behavior. The court's references to Ammons's soul demonstrate its awareness and consideration of his difficult upbringing. They are not evidence of bias.

Ammons also points to the court's comment that the case was a "top of the range" case and that the prosecutor had shown mercy by reducing the charge from first to second degree murder. But a judge's comments regarding the strength of evidence outside the jury's presence are not evidence of bias. State v. Carter, 77 Wn. App. 8, 11–12, 888 P.2d 1230 (1995). Likewise, "It is not evidence of actual or potential bias

[1] It appears the judge did not use the word "soul" in a religious sense. Rather, in context, the judge used the word to refer to the defendants' emotional problems and their impaired sense of right and wrong. See Webster's Third New International Dictionary 2176 (1993) (providing multiple definitions for "soul," including "man's moral and emotional nature as distinguished from his mind and intellect").

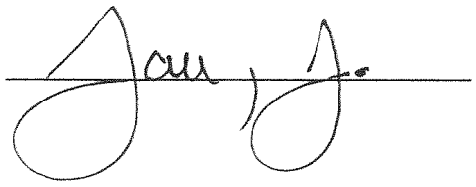
for a judge to point out to a defendant the harm caused to a victim by his or her criminal conduct." State v. Worl, 91 Wn. App. 88, 97, 955 P.2d 814 (1998).

Ammons relies on State v. Ra, 144 Wn. App. 688, 175 P.3d 609, review denied, 164 Wn.2d 1016 (2008). There, Division Two of this court determined that the trial court made inappropriate comments both during trial and at sentencing regarding the defendant and the victim. Ra, 144 Wn. App. at 705. For example, at one point the court scolded Ra, "'Don't shake your head up and down at me as if you are agreeing with me'" and at another point argued with Ra's attorney about the victim's service in the Iraq war, stating, "'[T]o say that this young man, who was very impressive to the Court and was fighting for our country was over there maybe just to kill people, I find offensive . . . .'" Ra, 144 Wn. App. at 696, 699. During trial, the court also proposed theories for the State to use to get certain evidence admitted. Ra, 144 Wn. App. at 705. Ultimately, the court reversed Ra's conviction on other grounds and did not reach the question of whether the court's actions demonstrated sufficient partiality to warrant reversal. Ra, 144 Wn. App. at 705.

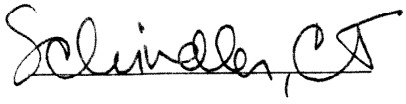
Ammons's case is distinguishable from Ra based on the nature of the comments at issue. Here, the court commented that the crime was one of the worst homicides he had seen in 21 years, and he accordingly decided to impose a sentence at the high end of the standard range. A defendant cannot demonstrate actual or apparent bias simply by pointing to an adverse decision by the trial court. See Davis, 152 Wn.2d at 692 ("Judicial rulings alone almost never constitute a valid showing of bias."). Moreover, Ammons does not suggest the sentencing judge had a personal interest in his case,

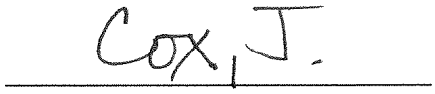
knew the victim, or displayed bias in any of the presentencing proceedings. Under these facts, Ammons fails to demonstrate that his right to due process was violated by judicial bias. Because he identifies no constitutional error, his due process claim also fails.[2]

For the foregoing reasons, we affirm.



WE CONCUR:





[2] In a pro se statement of additional grounds, Ammons asserts the sentencing court's comments violated several Canons of the Code of Judicial Conduct, including Canons 1, 2(A), (B), 3(A)(1)–(8), (B)(1), and (D)(1)(a). This assertion is without merit.